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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

ANITA S. BROTHMAN, GARY S. ROTHERGER, TOMMIE L. SUBER, DAVID L. BLOOM, WILLIAM C. AYERS, DAVID J. BERNSTEIN, DOUGLAS S. CHAPMAN, DAVID N. SMOKLER, ROBERT M. MEIER, SAMUEL R. FRIEDMAN, THOMAS F. ZIMMERMAN, ALAN H. JONES, LAURIE L. LIPSON, THOMAS F. MAYER, JOSEPH P. GAUGHN, PETER WOLFF, FRANCIS M. LIPTON, JOHN L. RAYNOR, EDWARD I. GEFFNER, ERIC T. CHESTER, GEORGE E. STEINITZ, PATRICK W. MURPHY, RICHARD A SHORTT, JEREMY J. LUSTIG, RICHARD P. GORDON, ALAN M. VALUSEK, PAUL H. KANTER and MICHAEL D. LOCKER,

Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Anita S. Brothman, Gary S. Rotherger, Tommie L. Suber, David L. Bloom, William C. Ayers, David J. Bernstein, Douglas S. Chapman, David N. Smokler, Robert M. Meier, Samuel R. Friedman, Thomas F. Zimmerman, Alan H. Jones, Laurie L. Lipson, Thomas F. Mayer, Joseph P.

Gaughn, Peter Wolff, Francis M. Lipton, John L. Raynor, Edward I. Geffner, Eric T. Chester, George Steinitz, Patrick W. Murphy, Richard A. Shortt, Jeremy J. Lustig, Richard P. Gordon, Alan M. Valusek, Paul H. Kanter and Michael D. Locker pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled case on June 14, 1967.

CITATIONS TO OPINIONS BELOW

No opinion of the Court of Appeals of Michigan was issued. The Order of the Court of Appeals granting the motion to affirm the judgment of conviction and sentence was issued on June 14, 1967, and is unreported. The Order is printed in the Appendix, *infra*, p. 17.

JURISDICTION

Application for leave to appeal the Order of the Court of Appeals to the Michigan Supreme Court was denied on August 22, 1967 (379 Mich 776). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since rights, privileges and immunities are claimed under the Constitution of the United States.

QUESTION PRESENTED

Where Petitioners (students and faculty members) engaged in a peaceful sit-in at the Ann Arbor offices of the Selective Service System to protest the United States involvement in the war in Viet Nam, does their conviction for trespass under a Michigan Statute abridge their right to freedom of speech and assembly, where

a) The protest was publicly scheduled to take place at the premises of the governmental agency appropriate to the object of their protest, after other methods of peaceful protest had been utilized; with minimum effect upon the property interests of the government and others involved; without threats or violence; the procedure (including the arrests) had been agreed upon in prior conference with the City Administrator; the object of the protest was of the greaest public concern and the petitioners sought to discharge a duty derived from domestic and international law in an effort to dissuade their government from continuing a war which they believed was immoral and which they had a reasonable basis for believing was illegal?

b) The statute, on its face and as applied, required no proof of wilfulness or malice.

THE CONSTITUTIONAL PROVISION AND THE STATE STATUTE INVOLVED

The First Amendment to the Constitution of the United States, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Michigan Criminal Trespass Statute (Michigan Statute Annotated, Section 28.820(1); Compiled Laws, 1948, Section 750.552) provides:

> Any person who shall wilfully enter, upon the lands or premises of another without lawful authority, after having been forbidden so to do by the owner or occupant, agent or servant of the owner or occupant, or any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or servant of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not more than 30 days or by a fine of not more than $50.00, or both, in the discretion of the court.

STATEMENT OF CASE

On October 15, 1965, a series of public protests against this country's involvement in the war in Viet Nam took place in Ann Arbor, Michigan. Most of those who participated were students at the University of Michigan, but a number of faculty members also participated. During the course of the day, a silent vigil was held on the campus in front of the library. Later, the protestants marched to an office building in the downtown area where the offices of the Federal Selective Service System were located (Tr. pp. 112-119).*

A group of the protestants, including Petitioners, went to the second floor, where the local offices of Selective Service were located and engaged in a sit-in protest in the reception area of the office. They remained on the premises for about three hours until 6:00 p.m., when the Assistant Chief of Police, after advising the protestants of the procedure for their arrest, introduced Col. Lindquist as the representative of Selective Service. Col. Lindquist read the Michigan trespass law, declared the office closed

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* References are to the certified transcript of testimony filed with the Clerk of this Court, and are designated (Tr. p. . .).

and ordered them to leave. After the protestants had sung two songs, the Assistant Chief of Police informed them "that you are all officially under arrest for violation of the Trespass Law in the area of the Selective Service Headquarters" (Tr. of tape recording).**

Petitioners were charged with violation of the Michigan Trespass Statute, as follows:

> One ———— being on the premises of another, to wit: the Selective Service Office, Local Board 85, 103 East Liberty Street, Ann Arbor, Michigan, upon being notified to depart therefrom by owner's agent and by the occupant, being without lawful authority, did then and there refuse or neglect to depart therefrom contrary to Section 28.820(1) of the Michigan Statutes Annotated. (Criminal Warrant).***

The Trial in the Circuit Court for Washtenaw County began before a jury on January 25, 1966. Although Petitioners were separately charged, all cases were consolidated for purpose of trial and later for purpose of appeal.

Petitioners offered to prove that on October 14th, the day before the public protest, a conference was held at the office of the City Administrator, Ann Arbor, with representatives of the protestants and University groups, and that the conferees there agreed upon the ground rules for the protest and the manner of handling the arrests (Tr. pp. 132-144).

The Court excluded the offer (Tr. p. 144).

Petitioners also offered testimony (Tr. p. 119) and a written offer of proof (Def. Ex. 1) to establish the reasons they had engaged in this form of protest, particularly relating to the illegality of the war in Viet Nam and prior

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** A tape recording of the incident was made by the police and transcription is attached to the certified transcript of testimony.

*** The certified pleadings and exhibits are on file with the Clerk of the Court.

ineffectual efforts to bring the matter to the attention of the American people and their representatives. The Court excluded the offer (Tr. pp. 8-9, 35, 129).

After the Respondent had rested (Tr. pp. 89-93), and again after the conclusion of the case (Tr, p. 155), Petitioners moved for a directed verdict of not guilty upon the grounds that the statute, on its face and as applied, was unconstitutional under the First and Fourteenth Amendments, because the element of "wilfulness" was not alleged or proved, because the evidence was not sufficient to sustain a verdict and for other reasons. The motions were denied (Tr. pp. 102, 155). The Trial Court had previously ruled that the statute did not require proof of wilfulness (Tr. pp. 36-38).

On January 28, the jury returned a verdict of Guilty and the Petitioners were sentenced to terms ranging from 15 to 20 days imprisonment, and fines of $50.00 each.*

Appeal was taken from the judgments to the Michigan Court of Appeals, where the cases were consolidated for purpose of appeal. Respondent filed a Motion to Affirm under Michigan Court Rules 817.5(3) on the ground that the "questions sought to be reviewed . . . are so unsubstantial as to need no argument or formal submission". (Motion to Affirm, certified record Court of Appeals.) The Court, by a two to one decision, without opinion, granted the motion (Appendix, p. 17).

Thereafter, Application for Leave to Appeal to the Michigan Supreme Court was filed by Petitioners. The cases were again consolidated for purpose of the appeal. On August 22, 1967, by a six to two decision, the Michigan Supreme Court, without opinion, denied the Application (Appendix, p. 18).

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* The maximum sentence is 30 days imprisonment and $50.00 fine.

The constitutional questions presented were raised by Petitioners at trial and were explicitly rejected by the Trial Judge *(supra)*. Petitioners again raised the constitutional issues in their Memorandum of Law before the Michigan Court of Appeals and in their Application for Leave to Appeal to the Michigan Supreme Court. (See certified records of these courts filed with the Clerk of this Court.)

REASONS FOR GRANTING THE WRIT

I.

Petitioners' Conduct was Within the Ambit of the First Amendment's Protection.

In engaging in peaceful protest against the government's politics in Viet Nam by a sit-in at the offices of the draft board, Petitioners' actions (which include elements of speech, assembly and petition) constituted a form of expression which is within the ambit of First Amendment protection. In *Brown v. Louisiana,* 382 U.S. 131 (1966), where defendants were convicted for disturbance of the peace for refusing to obey a police order to leave the public library in which they were engaged in a protest sit-in, this Court pointed up the dynamic character of First Amendment rights as including areas beyond the limited concept of mere "verbal expression":

> We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and assembly, and freedom to petition the Government for a redress of grievances . . . As this Court has repeatedly stated, *these rights are not confined to verbal expression. They embrace*

> *appropriate types of action* which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." (Emphasis supplied.) (at p. 141)

The Court has also held that peaceful picketing by striking employees, on company property, was a form of communication entitled to the protection of the First Amendment. *Thornhill v. Alabama,* 310 U.S. 88 (1940).

In *Edwards v. So. Carolina,* 375 U.S. 229 (1963), the Court reversed breach of the peace convictions of a large group of singing placard-carrying, stamping and hand-clapping demonstrators on the State House grounds at Columbia, South Carolina. The Court categorized this type of protest as "constitutionally protected . . . free speech, free assembly, and freedom to petition for redress of their grievances", and found that the protestors' conduct reflected "an exercise of these basic constitutional rights in their most pristine and classic form" (at p. 235).

In *Garner v. Louisiana,* 368 U.S. 157 (1962), Justice Harlan, in a concurring opinion reversing a disturbance-of-the-peace conviction of a group of students who had engaged in a lunch counter sit-in, pointed out the First Amendment character of the sit-in type of protest on matters of public concern:

> "Such demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas' (citations) as is verbal expression, more commonly thought of as 'speech'. It, like speech, appeals to the good sense and to 'the power of reason as applied through public discussion' (citations) just as much as, if not more than, a public oration delivered from a soapbox at a street corner. *This*

> *Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment (citations) to mere verbal expressions* (citations)." (Emphasis supplied.) (at p. 201)

It is significant that no attempt was made by the Ann Arbor police to prevent or stop the protest or to cause Petitioners' arrest for disturbance of the peace or any other violation of local or state law until the representative of Selective Service had read the Criminal Trespass Statute.

It is apparent that, for several hours, Petitioners' form of protest was not deemed illegal or incompatible with public order, but was understood and accepted by both the police and Selective Service as a legitimate, albeit annoying, method of publicly expressing their opposition to the government's Viet Nam policies.

Only after the closing hour of the Selective Service offices, when its representative, Col. Linquist, decided that the protest had continued long enough and after he had read the statute to the protestants, who refused to comply with his request to leave, did the peaceful protest become converted into criminal action. It was not the character or object of the protest which had changed, but only the attitude of the government agency toward its continuance.

The peaceful, public protest by these university students and faculty members on federally occupied property, upon a vital public issue, should be treated as an appropriate form of protected expression, to be measured against the property right asserted by the exacting standards required by the First Amendment. *Thomas v. Collins,* 323 U.S. 516, 530 (1945); *Marsh v. Alabama,* 326 U.S. 501, 509 (1946).

II.

Petitioners' First Amendment Right to Engage in Their Peaceful Sit-in Protest Was Abridged by the Application of Michigan's Trespass Statute.

The nature of Petitioners' protest was of the highest order—their belief that the war in Viet Nam was illegal and immoral. The ever present possibility that this undeclared, "small" war could escalate into nuclear holocaust certainly places this issue at the very summit of any echelon of values concerning which debate "should be uninhibited, robust and wide open". *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Petitioners offered proof of the illegality and continuing escalation of the war, the difficulty in effectively presenting to the government their point of view, including previous ineffectual efforts to do so, and the widespread opposition to the war expressed by respected world, national and local leaders and organizations (Def. Ex. 1). However, the Trial Judge excluded the offer and the argument as irrelevant (Tr. pp. 8-9, 35, 129).

Petitioners' moral committment to an effective means of peaceful protest is not merely the assertion of a *right* which is entitled to protection because of its importance in maintaining a free market place of ideas; it represents the means by which they can discharge their inescapable *obligation* as citizens in a democratic society. For, if, as Petitioners assert, their government has embarked upon an illegal and immoral war resulting in death and destruction to the inhabitants and property of another nation, it becomes their duty as citizens to preserve, by every

means tolerable in an organized society, in seeking to change the course undertaken in their name by their agent —the government.*

This duty finds further support in the undertaking by the United States, following World War II, together with twenty-two other nations, in adopting the London Agreement and Charter which defined as an international crime the "waging of war of aggression, or a war in violation of international treaties, agreements or assurances" (U. S. Exec. Agreement Serv. No. 472 (1946).) This undertaking was later unanimously adopted by the United Nations in a resolution in which it "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" (U.N. Gen Ass.A/C 6/69—Dec. 11, 1946).

Apart from the moral or legal effect of these documents upon the actions of nations, it is clear that they sought to involve the people by establishing the duty of the individual citizen to disassociate himself from the action of his own government when it engaged in a war in violation of their provisions. In its Judgment, the Nuremberg Tribunal put the matter in these words:

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* The historical basis for this concept of the First Amendment was suggested by Edmond Cahn.

> "We, the citizens of democratic nations, have long insisted that we alone are the sovereigns by whose name and under whose authority every official act of government is performed."
>
> "Representative government implicates us in their acts, their misdeeds and oppressions. It makes us participants—accomplices if you will—in the deeds that are done in our name and by our authority. Unexpectedly, we find that we have wandered into the circle of moral responsibility. For millennia, we have been accustomed to connecting ourselves only with the victim of wrong. As citizens living in a representative democracy, we suddenly find ourselves connected also with the inflicter of wrong." (Confronting Injustice, The Edmond Cahn Reader, p. 142)

> ". . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." (6 FRD at p. 110)

It is in the light of these considerations that we believe the right of these Petitioners to engage in their peaceful protest must be weighed as against the claim of Selective Service to exclude Petitioners from its offices. The Trial Judge treated these considerations as irrelevant and construed the statute as giving the Selective Service an absolute right to disposses Petitioners upon the reading of the Trespass Statute (Court's charge, Tr. p. 163).

We submit that the incidental and minor inconvenience to Selective Service, the occupant of the premises, occasioned by the continuance of the protest, is clearly outweighed by the importance of the First Amendment rights asserted.

Incidental inconvenience or expense to an individual or the community is not sufficient ground to justify the abridgment of First Amendment rights. In *Schneider v. State*, 308 U.S. 147 (1939), the ordinance involved forbade the public distribution of handbills which resulted in the littering of the streets. The conviction was reversed on the ground that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution" (at p. 163).

This point is highlighted in the recent case of *Adderley v. Florida*, 87 Sup. Ct. 242 (1966). There, a group of protestants against segregation policies of the County marched to the County Jail where their friends were incarcerated as a result of a previous arrest. They sang, danced and clapped, while standing or sitting on the jail

driveway and adjoining jail premises, thereby blocking the passage of vehicles to the jail entrance. Upon their failure to leave upon request of the sheriff, the protestants were arrested for violation of the State trespass law. The Court held that the conviction did not deprive the protestants of their First Amendment rights.

There are significant distinctions between *Adderley* and this case. First, the place and manner of the protest in *Adderley* was held to be a direct interference with a vital police function—the security of the jail. In this case, no such vital, public interest or indeed any public interest, was infringed upon by the protest and no element of public or obstruction of a public highway was involved.

Second, in *Adderley,* the Court emphasized the fact that jails, built for security purposes, traditionally are not open to the public. In contrast, Selective Service offices traditionally are and have always been open to the public, and the use of the offices for this purpose was not challenged.

Third, in *Adderley,* the Court indicated that a substantial element of the offense was in entering the jail grounds without warning to or permission from the sheriff, thereby suprising the sheriff and his deputies (at pp. 244, 246).

In this case, the Trial Judge refused to receive evidence of a meeting with the City Administrator on the day prior to the protest—a meeting at which the parties agreed upon the ground rules for handling the sit-in and any arrests which might result from the invocation of the criminal trespass law by Selective Service. The following day, the peaceful sit-in took place in the reception area of the offices, with the acquiescence of the Selective Service, and the arrests were handled in the agreed-upon

manner. Thus, Petitioners' procedure carefully avoided the objection which the Court, in *Adderley,* characterized as the claim of right to protest "whenever and however and wherever they pleased" (at p. 247).

Under conditions of modern society, where sit-in protests have become a significant means of public expression of views on important issues which are entitled to constitutional protection, the method used by these Petitioners must be considered reasonable and appropriate and not subject to abridgment by the use of the state trespass statute.

III.

The Michigan Trespass Statute Unconstitutionally Abridged Petitioners' First Amendment Rights by Failing to Require Proof of Wilfulness or Malice.

The Trial Judge interpreted the trespass statute as not requiring proof of wilfulness as an element of the offense* (Tr. pp. 37, 96) and so charged the jury (Tr. pp. 161-3). By this ruling, the Trial Judge foreclosed all attempts by Petitioners to prove that their motives were not to injure others or to gain personal advantage for themselves, or to show the sincerity which motivated them in conducting a peaceful protest upon an issue of great public importance.

If a line is to be ascertained by judge or jury, beyond which First Amendment rights are to be cut off by application of a criminal trespass statute, because of conflict with important countervailing interests, it should be drawn at a point which will permit the fullest possible exercise of such rights consistent with the existence of social order.

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* The first portion of the statute, relating to the "entry" upon premises, specifically requires proof of wilfulness.

> "It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly." *Thomas v. Collins, supra,* at p. 530.

New York Times v. Sullivan, supra, held that, in order to assure the greatest possible freedom of the press, even libellous statements were entitled to constitutional protection. Only where "actual malice" was shown would the expression lose its protection. Thus, although non malicious libel could undoubtedly cause damage to others, the Court concluded that the importance of robust, uninhibited expression to a democratic society was the paramount consideration.

New York Times suggests that the mechanical application of criminal trespass laws to prohibit or curtail peaceful protest by a mere showing that the protestants refused to leave when ordered by the property owner or accupant, permits this vital area of public debate to be narrowed to the vanishing point.

Indeed, in *Adderley v. Florida, supra,* the Court pointed out that the Florida statute required proof of "malicious and mischievous intent." And, in distinguishing its prior decision in *Edwards v. South Carolina, supra,* the Court stated that, by the use of this phrase in the Florida statute, the "scope of the offense" was narrowed, thus making "its meaning more understandable and clear" for constitutional purposes (at p. 245).

Michigan's criminal trespass statute, applied so as to curtail Petitioners' peaceful protest without proof of wilfulness or malice, conflicts with First Amendment standards for protecting such rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GOODMAN, EDEN, ROBB, MILLENDER,
GOODMAN & BEDROSIAN,
By: ERNEST GOODMAN,
3200 Cadillac Tower,
Detroit, Michigan 48226,

CHESTER J. ANTIEAU,
205 Ann Arbor Trust Building,
Ann Arbor, Michigan,
Attorneys for Petitioners.

November 14, 1967.

APPENDIX

MICHIGAN COURT OF APPEALS ORDER GRANTING MOTION TO AFFIRM

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Lansing, on the 14th day of June in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable Timothy C. Quinn, Presiding Judge, Thomas Giles Kavanagh, Louis D. McGregor, Judges.

In these causes a motion to affirm the judgment of conviction and sentence is filed by plaintiff-appellee for the reason that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission, and an answer in opposition thereto having been filed and due consideration having been had by the Court,

It is ordered that the motion to affirm be, and the same is hereby granted.

Judge Thomas G. Kavanagh dissents from this order.

State of Michigan—ss.

I, Ronald F. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 14th day of June in the year of our Lord one thousand nine hundred and sixty-seven.

Ronald L. Dzierbicki,
Clerk.

MICHIGAN SUPREME COURT ORDER DENYING LEAVE TO APPEAL

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 22nd day of August in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Theodore Souris, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

On order of the Court, the application for leave to appeal is considered and the same is denied, for the reasons that a mertitorious basis for appeal is not presented and the decision of the Court of Appeals is not clearly erroneous.

Kavanagh and Souris, JJ, dissent.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of August in the year of our Lord one thousand nine hundred and sixty-seven.

Harold Hoag,
Deputy Clerk.